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90-458

Supreme Court, U.S.

FILED

SEP 14 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

FRANK J. CAMOSCIO,

PETITIONER,

VS.

THE PATRIOT LEDGER, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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37

QUESTIONS PRESENTED

A. IS THE PETITIONER ENTITLED
TO PUNITIVE DAMAGES AGAINST THE RE-
SPONDENTS SINCE THEY KNOWINGLY PRINTED
A FALSE STORY AND REFUSED TO PRINT THE
TRUE STORY.



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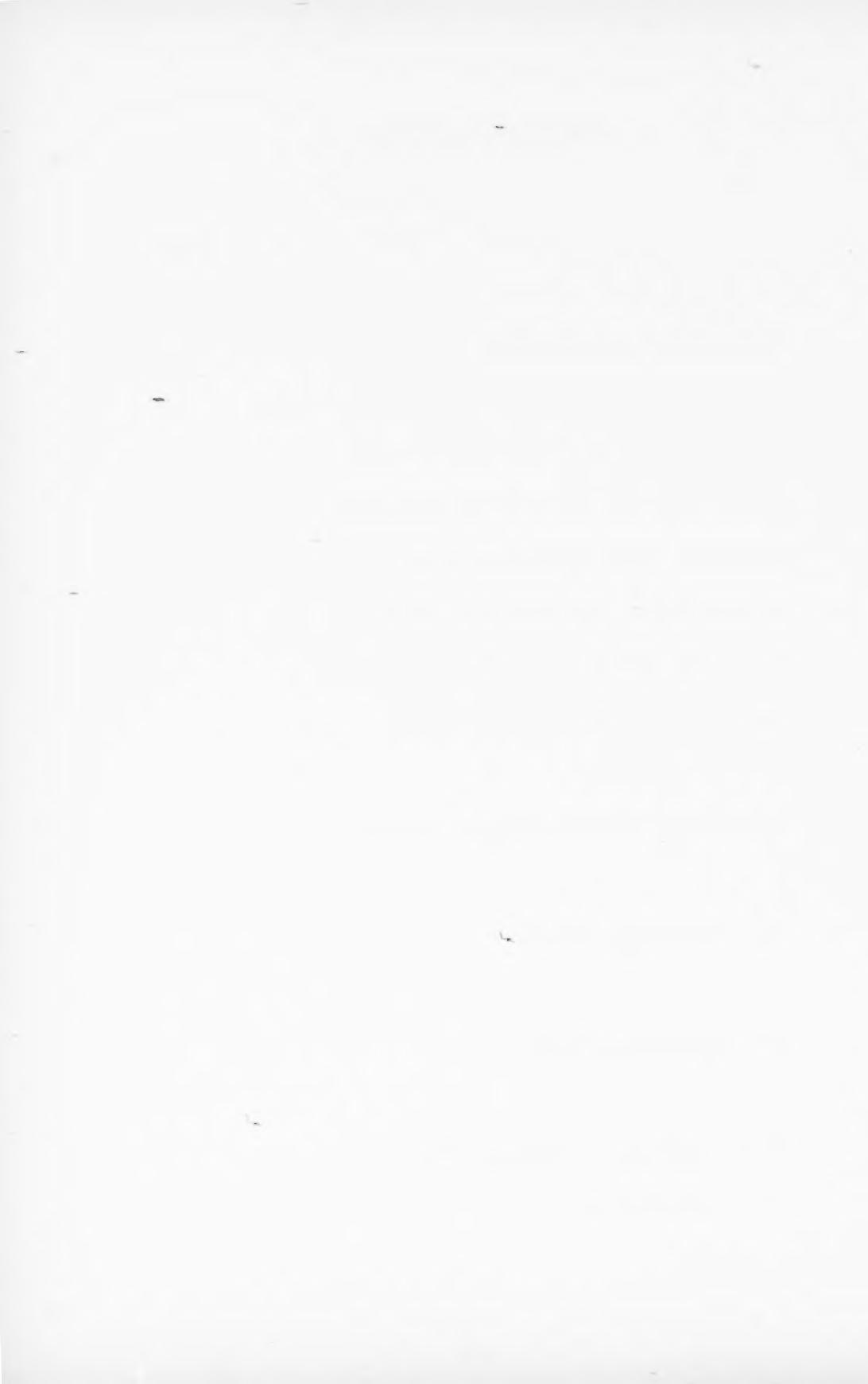


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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner, Frank J. Camoscio,
respectfully prays that a writ of cer-
tiorari issue to review the judgment
and opinion of the Massachusetts Su-
preme Judicial Court entered in the
above-entitled cause on June 28, 1990.

I.

OPINION BELOW

The memorandum opinion of the
Court of Appeals of Massachusetts is
attached as Appendix A. The Supreme
Judicial Court of Massachusetts deny-
ing further appellate review is at-
tached as Appendix B. The written
memorandum of the lower court is at-
tached as Appendix C.



II.

JURISDICTION

The entry of judgment from the Massachusetts judicial system was entered on June 28, 1990. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254 (1).

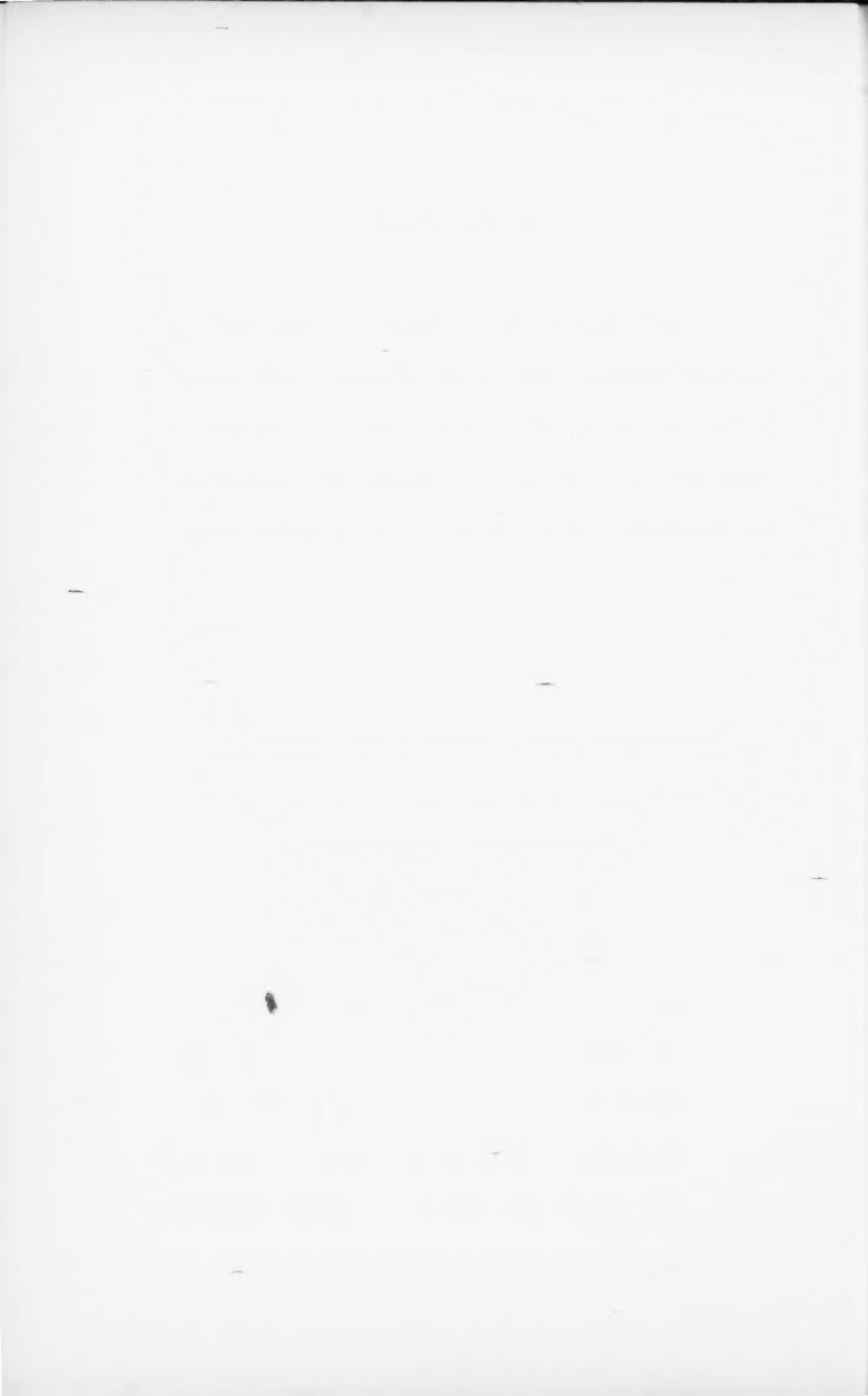
III.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, Section 1 of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce



any law which shall abridge the
privileges or immunities of citi-
zens of the United States; nor
shall any State deprive any per-
son of life, liberty or property,
without due process of law; nor
deny to any person within its
jurisdiction the equal protection
of the laws.

IV.

STATEMENT OF FACTS

The petitioner, Frank J. Camoscio, filed a libel suit against the newspaper The Patriot Ledger and its reporter Eve Epstein for an article she had written entitled "Disgruntled Boston Foot Doctor Petitions to Give Dukakis the Boot" which appeared in the newspaper on September 17, 1988. The Patriot Ledger through its representative William Flynn



admitted that the article in question was false but the newspaper refused to print the truth forcing the petitioner to file suit. Mr. Flynn for the Patriot Ledger stated that such an article containing the truth if printed would offend state officials and, therefore, the newspaper could not print the true facts.

The respondents' attorney James C. Heigham when questioned by Judge Grabau concerning the validity of paragraph 9 of the original complaint that reads as follows: "The Plaintiff contacted William Flynn of the Patriot Ledger who admitted that the article is false but the paper refuses to print the true complete story." Heigham stated, "That is true, Your Honor."

Judge Grabau wrote a memorandum dismissing the case on January 20, 1989. This memorandum contradicted facts pre-

sented before him. On page 3 of Judge Grabau's memorandum, Judge Grabau states the following: "Camoscio claims that the first paragraph of the Ledger article is false. The paragraph states that Camoscio had been practicing podiatry without a license since 1984. Camoscio contends that he has only been practicing without a license since 1987." Camoscio appeared before Judge Grabau and stated the following which contradicts Judge Grabau's memorandum: "Let him [Mr. Heigham] show me one person that I have ever treated, by affidavit."

The petitioner was greatly offended by the last paragraph of the libelous article which states the following: "Camoscio, has continued to practice podiatry, although the board removed his license for life, and disciplined him for allegedly threatening a board investigator." Camoscio never

threatened a board investigator nor was he ever disciplined by the board for such an act.

Judge Grabau, in the last paragraph of his memorandum, contradicted reality when he wrote: "Camoscio claims that the ending paragraph is false because it states his license was revoked without stating why and implies the revocation resulted from his alleged threatening of a Board investigator. The publisher's privilege outlined in Sibley also covers this paragraph as the subject matter of the paragraph is again Board proceedings." Judge Grabau and Attorney Heigham both knew that Camoscio never threatened a Board investigator, as demonstrated by the transcript.

The petitioner Frank J. Camoscio is presently before the State Supreme Judicial Court in a Petition of Equity



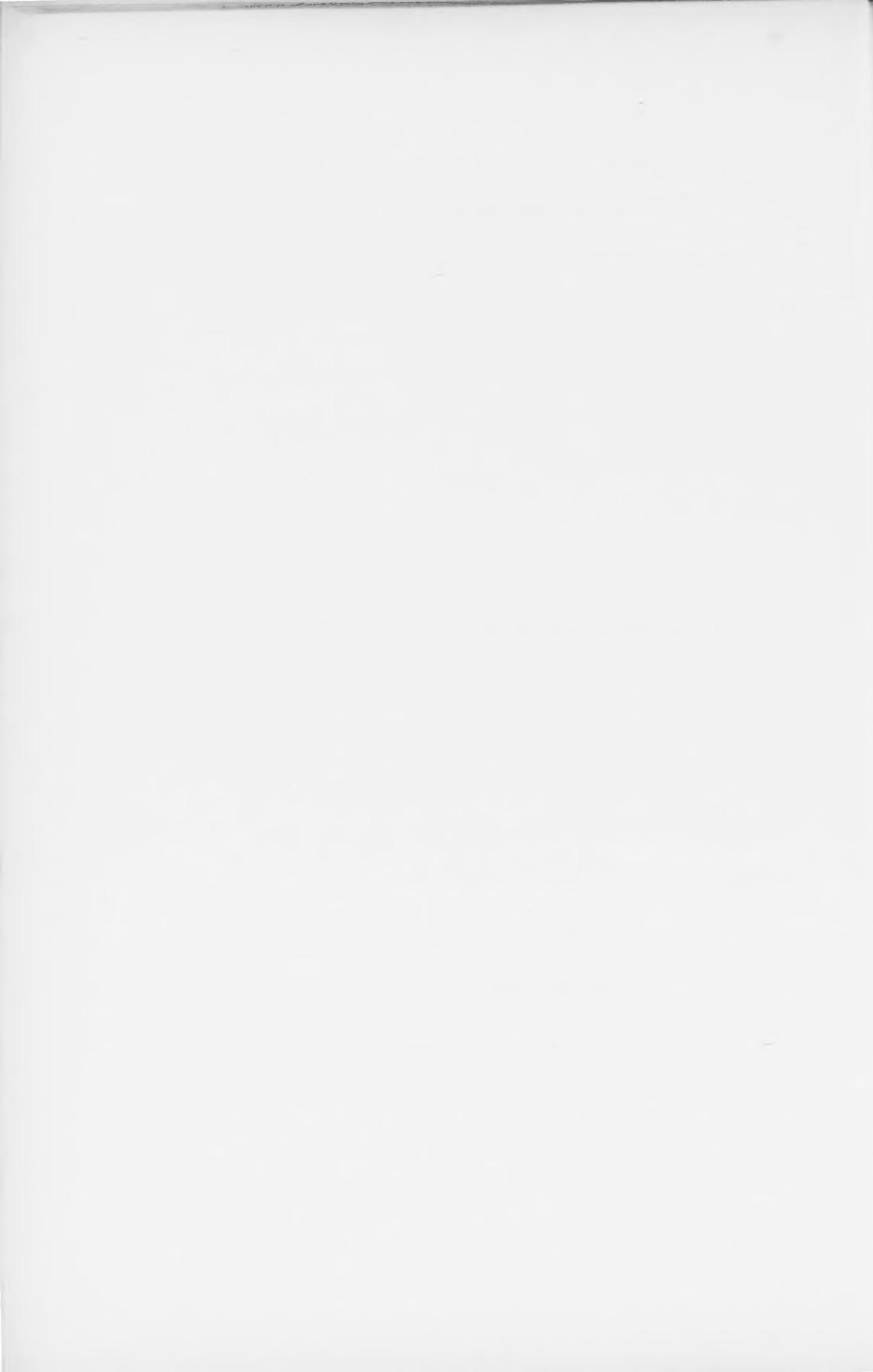
to reinstate his podiatric license since he has discovered that the Board of Registration in Podiatry had committed fraud upon the court. Therefore, the petitioner has been grievously injured by the newspaper not printing a complete and true story.

V.

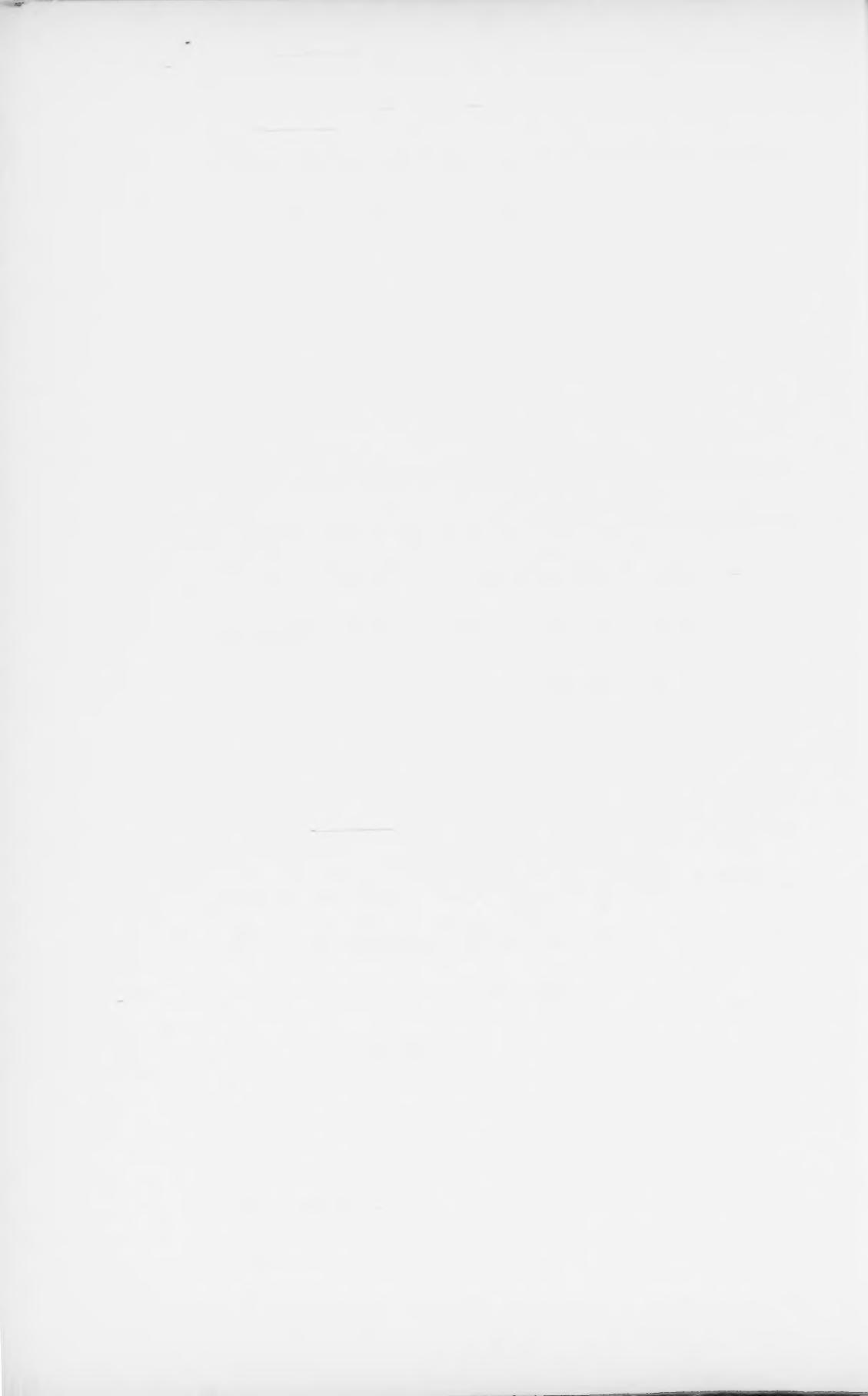
REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DELINEATE THE PRESS'S RESPONSIBILITY TO PRINT THE TRUTH.

The Massachusetts court system ruled that the Patriot Ledger did not have to pay damages to the petitioner, even though the story the paper had printed was false which their counsel had admitted to the court. The news-



paper refused to print the true story because it was embarrassing to state officials. The judge denied the petitioner the right to have a jury decide if he was entitled to damages and, if so, how much. The judge erred in his decision because the paper knowingly published a false story but refused to print the true story. The petitioner cites the following case: Petition of Retailers Commercial Agency, Inc., 342 Mass. 515, 174 N.E. 2d 376, "It has long been recognized that an absence of good faith may tend to prove ill will... But whether the lack of good faith is said to be symptomatic of ill will, or an abuse in itself, it is clear that there is no reason to protect such communications. A lack of good faith may be shown by recklessness ... if a defendant makes a report which he asserts to be true... when he has no



reasonable grounds or probable cause for so doing, it could be found that he has not acted in good faith, and has abused the privilege."

Common sense would dictate that the petitioner had suffered by this false story which benefitted state officials. The Patriot Ledger had a vested interest in knowingly publishing this false story. Otherwise, the newspaper would have printed the truth and there would have been no court action. The petitioner had approached the newspaper asking them to print the true story but the paper refused, thus forcing the petitioner to seek a legal remedy.

VI.

CONCLUSION

This case presents the court with



an opportunity to set limits on the press from knowingly printing false stories concerning public and private individuals but refusing to print the truth about public officials because it would embarrass them.

Respectfully submitted,

Frank J. Camoscio

Frank J. Camoscio
Pro se
252 Hanover Street
Boston, Massachusetts 02113

DATED: September 12, 1990

Domenic Bruno
NOTARY PUBLIC

My Commission Expires May 29, 1992

Domenic Bruno
91.2/90

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition For Writ of Certiorari were mailed to James C. Heigham, of Choate, Hall & Stewart, 53 State Street, Boston, Massachusetts 02109.

I hereby certify that all the statements contained in my Certificate of Service are true and are made under the pains and penalties of perjury.

Frank J. Camoscio
Frank J. Camoscio
Pro Se

Domenic Bruno
NOTARY PUBLIC
My Commission Expires May 25, 1995

Domenic Bruno
9/12/90

APPENDIX



COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH,
AT BOSTON, May 2, 1990

IN THE CASE OF

FRANK J. CAMOSCIO

vs.

THE PATRIOT LEDGER & another.

pending in the Superior

Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,--

Judgment affirmed.

BY THE COURT

CLERK.

May 2, 1990.

OVER

NOTE:
The original of the
within rescript will
issue in due course,
pursuant to M.R.A.P.
23. APPEALS COURT



COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

89-P-485

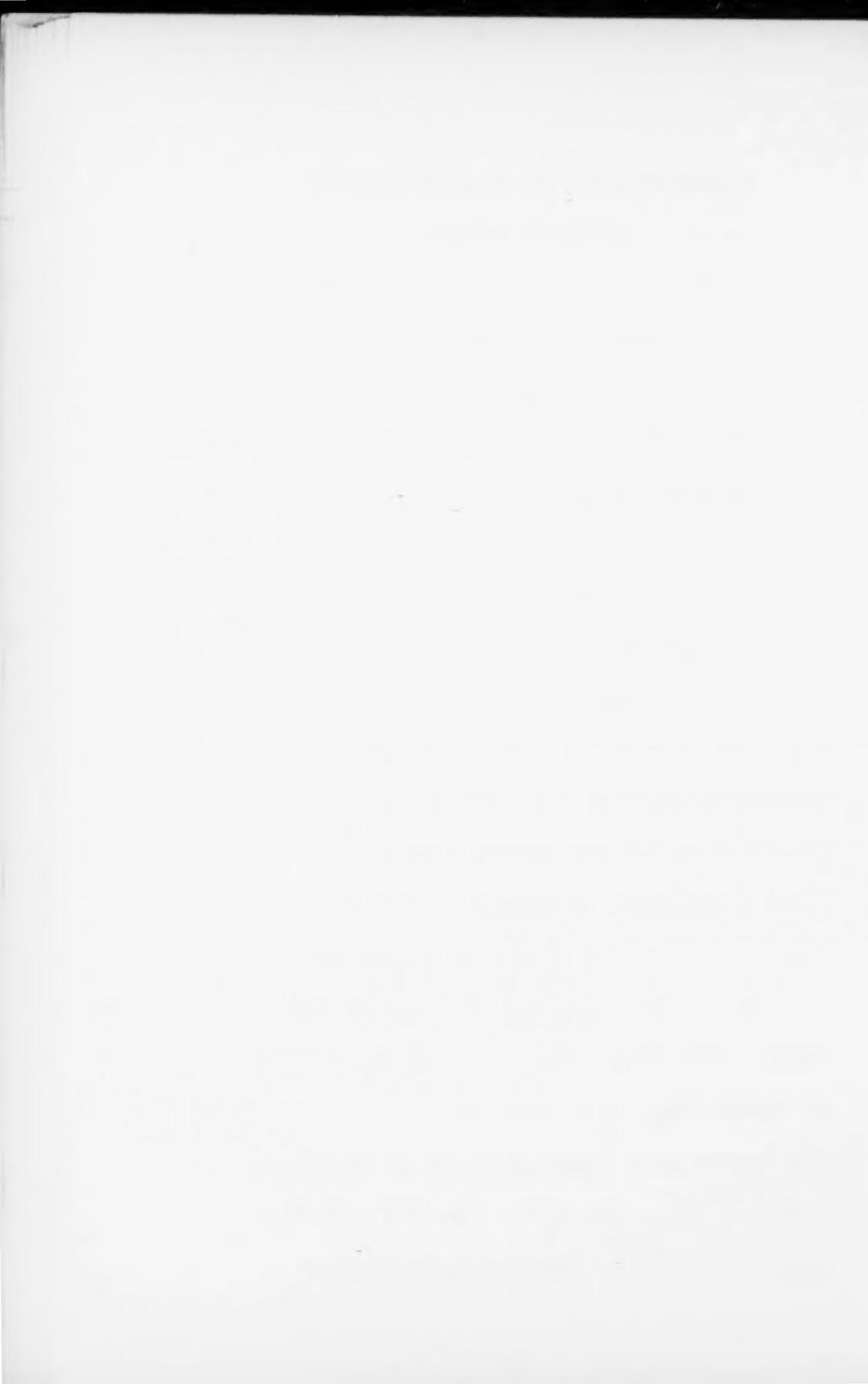
FRANK J. CAMOSCIO

vs.

THE PATRIOT LEDGER & another ✓¹

MEMORANDUM AND ORDER UNDER RULE 1:28

1. As an initial point on appeal, the plaintiff Camoscio insists that the trial judge should have disqualified himself because he had acted on motions earlier in the proceedings. Generally, disqualification is left to the sound discretion of the trial court judge. Bias requiring disqualification must ordinarily arise from an extrajudicial source. Commonwealth v. Gogan, 389 Mass. 255, 259 (1983); Howe v. Prokop, 21 Mass. App. Ct. 919, 919-920 (1985). See generally Commonwealth v. Campbell, 5 Mass. App. Ct. 571, 586-588 (1977); Commonwealth v. Dane Entertainment



Servs., Inc., 18 Mass. App. Ct. 446,
449 (1984). There was no abuse of dis-
cretion here.²

2. On the question whether the
article complained of was defamatory,
we find persuasive, and therefore

¹ Eve Epstein, the reporter
who wrote the article the plaintiff
complains about.

² In deciding the appeal, the
court has given consideration to the
materials in the plaintiff's supple-
mental appendix.



adopt, the reasoning of the memorandum and order of the Superior Court judge dated January 20, 1989.

We read the judge as having grasped that Camoscio's point is that, while his license to practice was, in fact, suspended in April, 1984, he did not resume practicing without a license until February, 1987. The judge equally understood that such opprobrium as flowed from the article onto Camoscio came from the license suspension date. The newspaper story, as matter of judicial record in earlier cases, was exactly right about that date.

3. Apart from the nondefamatory nature of the article, we are of opinion that the motion to dismiss was also properly allowed because, on the record, the plaintiff is libel-proof.

See Jackson v. Longcope, 394 Mass. 577, 578-583 (1985). Concerning Camoscio's



standing as a podiatrist in the eyes of the Board of Registration in Podiatry, there had been three published opinions: Camoscio v. Board of Req. in Podiatry, 385 Mass. 1002, cert. denied, 457 U.S. 1139 (1982); Camoscio v. Board of Req. in Podiatry, 394 Mass. 1006 (1985); Camoscio v. Smith, 26 Mass. App. Ct. 922 (1988). Camoscio's status as a podiatrist, the subject of the newspaper article, was not in September, 1988, when the article appeared, susceptible to damage.

Judgment affirmed

By the Court (Warner, C.J.

Perretta & Kass, JJ.),

Nancy Turck Foley

Clerk

Entered: May 2, 1990.



SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

Office of the Clerk
1412 Court House
Boston, MA 02108

No. FAR- 5420

FRANK J. CAMOSCIO

vs.

THE PATRIOT LEDGER & another

The above-captioned Application for
Further Appellate Review is

DENIED

Jean M. Kennett.
Clerk



COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 88-5667

FRANK J. CAMOSCIO

vs.

THE PATRIOT LEDGER and EVE EPSTEIN

MEMORANDUM AND ORDER

BACKGROUND

Defendants, The Patriot Ledger (Ledger) and Eve Epstein (Epstein), have moved to dismiss pursuant to Mass. R. Civ. P. 12 b (6). Plaintiff, Frank J. Camoscio's (Camoscio) complaint is pro se and broadly read alleges claims based upon libel and intentional infliction of emotional distress. The defendants' assert the affirmative defenses of truth and privilege and claim



Camoscio is libel-proof regarding the history of Board of Registration in Podiatry (Board) proceedings involving him and his continuing podiatry practice.

All allegations stem from Epstein's article in the Ledger dated September 17, 1988, and entitled Disgruntled Boston Foot Doctor Petitions to give Dukakis the Boot. A hearing on the motion was held on December 29, 1988, pursuant to Superior Court Rule 9A(b). The parties have filed briefs supporting and opposing defendants' motion. The allegations are based on common law tort theory and this court has original jurisdiction as the trial court of general jurisdiction. See G.L. c. 212, § 4 and New England Tel. & Tel. Co. v. District Attorney for Norfolk District, 374 Mass. 569, 572 (1978).



DISCUSSION

While Massachusetts courts favor summary judgment procedures in defamation cases, New England Tractor-Trailer Training of Connecticut, Inc. v. Globe Newspaper Co., 395 Mass. 471, 480 (1985), the defendants' motion to dismiss pre-empts a summary judgment proceeding pursuant to Mass. R. Civ. P. 56. As the moving parties, the defendants must prove "beyond doubt that there is no set of facts which the plaintiff could prove in support of his claim which would entitle him to relief." Maurice Epstein v. Liberty Bank & Trust Company, 12 Mass. App. Ct. 1000 (1981)(rescript) quoting Howard v. G.H. Dunn Ins. Agency, Inc., 4 Mass. App. Ct. 868 (1976). Although Camoscio's pro se complaint fails to clearly articulate legal theories and corresponding supporting facts, allowance for leeway



under notice pleading standards combined with the defendants' opportunity to use Mass. R. Civ. P. 12(e)(motion for more definite statement) prevent the plaintiff's inarticulateness from prejudicing his opposition to defendants' motion to dismiss. See Epstein, supra at 1000. Cf. Humphrey v. National Semiconductor Corp., 18 Mass. App. Ct. 132, 135-136 (1984) (when one party moves and adequately supports a summary judgment motion the opposing party cannot rely on unsubstantiated allegations of malice).

Camoscio's libel claim is based upon the first, penultimate and ending paragraphs of the Ledger article.

"[P]rivate persons . . . may recover compensation on proof of negligent publication of a defamatory falsehood."

New England Tractor-Trailer, supra at 476-477 quoting Stone v. Essex County



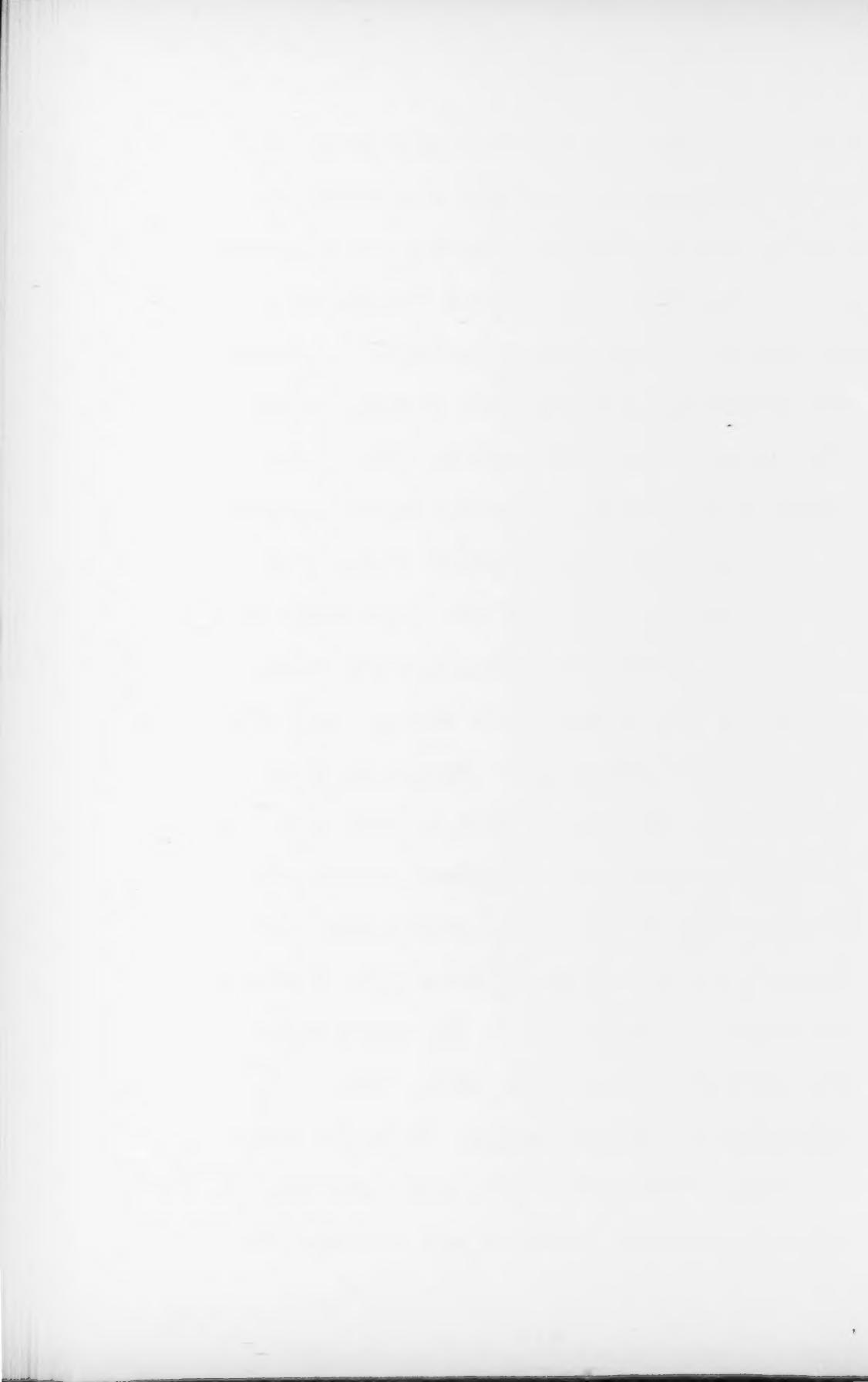
Newspapers, Inc., 367 Mass. 849, 858 (1975) (emphasis in original). Camoscio can recover if "[the Ledger] was negligent in publishing defamatory words which reasonably could be interpreted to refer to the plaintiff." New England Tractor-Trailer, 395 Mass. at 477. While the old test enunciated in Hanson v. Globe Newspaper Co., 159 Mass. 293-294 (1893) required the plaintiff to prove the defendant's subjective intent to publish defamatory words "of and concerning" the plaintiff, the new test only requires that the plaintiff show the defendant was negligent in writing words reasonably calculated to "hit" the plaintiff. New England Tractor-Trailer, supra at 478. The court stated "[t]he question is not so much who was aimed at, as who was hit". Id. quoting Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 63-64 (1920). This new objective



test, limited to the conclusions of the reasonable reader, is the standard governing the defendants' motion to dismiss.

Camoscio claims that the first paragraph of the Ledger article is false. The paragraph states that Camoscio has been practicing podiatry without a license since 1984. Camoscio contends that he has only been practicing without a license since 1987. If the paragraph is true, its truth is a complete defense.

See Jones v. Taibbi, 400 Mass. 786, 794 (1987). In Camoscio v. Board of Registration, 394 Mass. 1006 (1985) the court directed that judgment enter affirming the Board's decision revoking Camoscio's podiatry license. The Board's decision is dated March 14, 1984 and was effective April 1, 1984. See Camoscio v. Edward Smith, 26 Mass. App. Ct. 922 (1988)(rescript)(also stating that Camoscio's license was revoked in



1984). Based upon this evidence, there is no possible set of facts upon which Camoscio can state a claim for libel. Since the Ledger paragraph is true and no claim is made that the manner of publication was "extreme or outrageous" no claim for intentional infliction of emotional distress is supportable. See Aqis v. Howard Johnson Co., 371 Mass. 140, 145 (1976) (setting out "extreme and outrageous" conduct as a prerequisite for an intentional infliction of emotional distress claim.) This court express no opinion on whether a true statement can base a claim for intentional infliction of emotional distress but only states as a matter of law that such an action will not accrue absent extreme and outrageous conduct.

Camoscio claims that the penultimate paragraph is also false. The paragraph states that Camoscio testi-



fied against another podiatrist Edward J. Fleming (Fleming) at a Board hearing regarding Fleming's podiatric license. The paragraph states that the Podiatry Board refused to revoke Fleming's license. No date is given for the Board's refusal.

A previous Ledger article of May 12, 1987, chronologically seriates the Board hearings where Camoscio testified against Fleming regarding Fleming's qualifications to hold a podiatric license. The May 12, 1987, article is an attachment to Camoscio's complaint and paragraph six of the complaint references the May 12, 1987, article as a true account of the disputed hearings. For the purposes of this motion to dismiss the court accepts the May 12, 1987, article's truth as presenting the facts in the light most favorable to Camoscio, the party opposing the motion. Connerty



v. Metropolitan District Commission,

398 Mass. 140, 143 (1986).

The May 12, 1987, article states that Camoscio testified against Fleming in 1974 and that the Board refused to revoke Fleming's license. Camoscio appealed to the Superior Court for review of the Board Decision and in 1978 the Court ordered further review of Fleming's license which was subsequently revoked by the Board in 1979.

Comparing the September 17, 1988, Ledger article at issue in this action with the Ledger article of May 12, 1987, it is apparent that the penultimate paragraph of the September 17, 1988, article is truthful if it relates to the 1974 hearings but false if it refers to the 1979 hearings. As the paragraph contains no reference date, and the facts must be taken in the light most favorable to Camoscio, the defendants cannot



use truthfulness as an affirmative defense to sustain their burden of proof on their motion to dismiss.

The defendants contend that the reference to Camoscio's testimony against Fleming is not defamatory as a matter of law. See Peak v. Wakefield Item Co., 280 Mass. 451, 453-455 (1932) (statements regarding initiating litigation or testifying are not defamatory as a matter of law). Community standards defining defamation have evolved since 1932 and what was not libellous as matter of law in Peak may now be actionable. See New England Tractor-Trailer, 395 Mass. at 478-479. However the standards for defamation have evolved, if the penultimate paragraph of the Ledger article refers to the 1979 hearing it is false, possibly actionable; and this possibility prevents truth from being grounds upon



which the motion to dismiss can be granted.

The defendants' also contend that the Ledger article is privileged within the scope of the publisher's privilege as stated in Sibley v. Holyoke Transcript-Telegram, 391 Mass. 468, 470. (1984). The penultimate paragraph discusses the Board proceedings against Fleming and so falls within the scope of the publisher's privilege outlined in Lewis v. Vallis, 356 Mass. 662, 666 (1970)(extending privilege to fair and accurate reports of quasijudicial administrative proceedings). Any ambiguity caused by the absence of a reference date in the paragraph is *diminimus* and does not void the privilege. See Joyce v. Globe Newspaper Co., 355 Mass. 492, 494-497 (1969) and Nearis v. Essex County Newspaper, Inc., 2 Mass. App. Ct. 831 (1974). Since the publisher's priv-



ilege is applicable to the fair and accurate reporting of Board proceedings, and these proceedings are the sole subject matter of the penultimate paragraph, the paragraph cannot be the grounds for a valid action in libel.

Sibley, supra at 471. Nor can the paragraph be grounds for a claim of intentional infliction of emotional distress as it does not rise to "extreme and outrageous" conduct necessary for recovery. Aqis, 371 Mass. at 145.

Camoscio claims that the ending paragraph is false because it states his license was revoked without stating why and implies the revocation resulted from his alleged threatening of a Board investigator. The publisher's privilege outlined in Sibley also covers this paragraph as the subject matter of the paragraph is again Board proceedings. Sibley, supra at 470. Any ambiguity which arises



from the cryptic text of the paragraph does not vitiate the privilege. See Joyce, supra at 494-497 and Nearis, supra at 831. Nor can the paragraph be grounds for a claim of intentional infliction of emotional distress. See Aqis, supra at 145.

ORDER

Accordingly, it is ORDERED that entry be made ALLOWING the defendants' motion to dismiss.

Charles M. Grabau

Charles M. Grabau
Justice of the Superior Court

Dated: January 20. 1989